Supreme Court, U.S.
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No. 01-1547

In The Supreme Court of the United States

SOUTH CAMDEN CITIZENS IN ACTION, ET AL.,
Petitioners,

v.

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,
Respondents,

ST. LAWRENCE CEMENT CO., L.L.C.,
Intervenor-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF INTERVENOR-RESPONDENT ST. LAWRENCE CEMENT CO., L.L.C.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Can a regulation create a federal right enforceable under 42 U.S.C. § 1983 when no such right is found in the underlying statute?

2. Is a regulation that prohibits a federal funding recipient from using "criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex" based on a right found in Title VI of the Civil Rights Act of 1964?

CORPORATE DISCLOSURE STATEMENT

Intervenor-Respondent St. Lawrence Cement Co., L.L.C. submits the following statement of its corporate interests and affiliations for the use of the Justices of this Court:

1. Intervenor-Respondent St. Lawrence Cement Co., L.L.C. is a publicly held corporation or other publicly held entity.

2. St. Lawrence Cement, Inc. owns 100% of the stock of St. Lawrence Cement Co., L.L.C. St. Lawrence Cement, Inc. is a wholly owned subsidiary of St. Lawrence Cement Group, Inc. Holcim (US) Inc. owns 66% of St. Lawrence Cement Group, Inc.

3. To the best of St. Lawrence Cement Co., L.L.C.'s knowledge, no other party in this matter is a publicly held corporation or other publicly held entity.

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COUNTERSTATEMENT OF THE CASE

1. Factual Background

In 1998, St. Lawrence Cement Co., L.L.C. ("SLC") selected a site in Camden, New Jersey owned by the South Jersey Port Corporation ("SJPC") for construction and operation of a new facility to process granulated blast furnace slag ("GBFS"), an economical and environmentally friendly partial substitute for the use of portland cement in concrete. On March 8, 1999, SLC signed a lease for the Camden site and began planning for its new GBFS-grinding facility ("the Facility"), including initiating pre-application discussions with the New Jersey Department of Environmental Protection ("NJDEP") to obtain all necessary permits for construction and operation of the Facility. Appendix B ("App. B") at 7a.

The primary focus of SLC's permitting efforts was obtaining air permits and, specifically, minimizing the emission of particulate matter with a diameter of 10 microns or less ("PM10"). App. B at 7a. In order to provide the most stringent safeguards to the community, NJDEP required that SLC conduct a PM10 air quality impact analysis. App. B at 7a. Such an analysis – the most sophisticated analysis approved by the United States Environmental Protection Agency ("EPA") – predicts ambient air concentrations downwind from the source of the emissions, accounting for the source of the emissions, meteorological conditions – including wind speed and direction, temperature, and atmospheric turbulence – buildings, and other man-made and natural influences, such as other industrial sources of PM10 emissions near the source at issue. The results of the analysis are then compared to the primary National Ambient Air Quality Standards ("NAAQS"). App. B. at 7a. EPA established the

NAAQS to protect the public health, including the health of "sensitive" populations such as asthmatics, children, and the elderly, with an adequate margin of safety. 40 C.F.R. Part 50.

SLC's analysis showed that the Facility was well within the NAAQS for PM10 and would meet all applicable air quality standards identified by NJDEP. NJDEP approved those results, confirming that no adverse health impacts would be expected and that SLC's operations complied with the NAAQS for PM10. App. B at 7a.

After reviewing the results of SLC's air quality impact analysis and voluminous other documentation submitted with respect to the Facility during a 17-month application process, NJDEP provided public notice on July 25, 2000 of an August 23, 2000 public hearing on SLC's draft air permits. App. B at 7a. In its notice, NJDEP stated that it would also accept written comments on the draft permits until August 31, 2000. App. B at 8a.

Following the public hearing and comment period and based on its review of the hearing transcript and subsequent written comments, NJDEP issued a comprehensive, 33-page "Hearing Officer's Report Responses to Public Comments on the Draft Air Permit" (the "Response to Comments Document"), in which it addressed all of the air permitting-related issues raised by the public. Further, with the assistance of its Office of Equal Opportunity Contract Assistance and Environmental Equity, NJDEP provided responses to all of the issues raised by Petitioners and their counsel both at the public hearing and in written submissions, including (1) environmental justice; (2) pre-existing local environmental issues; (3) SLC's emission limits; (4) SLC's PM10 air quality impact

analysis results; (5) truck emission standards and carbon monoxide air quality evaluation results (confirming no exceedance of air quality standards); and (6) protection of local residents' health and safety. App. B at 8a.

On October 31, 2000, along with its Response to Comments Document, NJDEP issued SLC's five Air Pollution Control Pre-Construction Permits and Certificates to Operate (collectively, the "Air Permit") authorizing operation of the Facility. App. B at 8a.

2. Proceedings Below

On October 4, 2000, Petitioners South Camden Citizens in Action, Julita Gilliard, Gwen Peterson, Barbara Pfeiffer, Geneva Sanders, and Pauline Woods, as well as several other local residents, filed an administrative complaint with EPA, claiming that NJDEP had violated EPA's nondiscrimination rules at 40 C.F.R. §§ 7.10 to 7.135 in issuing the Air Permit. Without waiting for a response from EPA, however, Petitioners filed a Verified Complaint for Declaratory Judgment and Injunctive Relief (the "Verified Complaint") in the United States District Court for the District of New Jersey on February 13, 2001, claiming, among other things, that NJDEP and NJDEP Commissioner Robert C. Shinn, Jr. (collectively, "Defendants") violated Title VI of the Civil Rights Act of 1964 ("Title VI") by issuing the Air Permit. App. B at 8a-9a. Specifically, Petitioners alleged that Defendants intentionally discriminated against them in violation of Title VI, Section 601, 42 U.S.C. § 2000d, by issuing the Air Permit and that operation of the Facility under the Air Permit would have an adverse, disparate impact in violation of Title VI, Section 602, 42 U.S.C. § 2000d-1. App.

B at 8a-9a. They requested that the district court declare the Air Permit invalid, enjoin the Facility's operation, and require Defendants to institute various safeguards against discrimination in future permitting decisions. Along with the Verified Complaint, Petitioners filed a motion for a preliminary injunction requesting that the district court temporarily rescind the Air Permit issued to SLC[1] until it reached a decision on the merits of the case. App. B at 9a.

On April 19, 2001, following the submission of briefs and expert reports as well as oral argument, the district court relied on Petitioners' Title VI, Section 602 disparate impact claim to grant Petitioners' request for a preliminary injunction and remand the matter to NJDEP for a Title VI analysis (the "April 19 Decision"). App. B at 9a. On April 24, 2001, however, this Court issued its decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), holding that "[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists," *id.* at 293 (footnote omitted).

Acknowledging that *Sandoval* invalidated its April 19 Decision, the district court allowed Petitioners to amend their Verified Complaint with a claim to enforce Title VI, Section 602 through 42 U.S.C. § 1983 (the "Amended Complaint"), but denied SLC's request to vacate the injunction. App. B at 9a. On May 10, 2001, the district court issued a supplemental opinion and order (the "May

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[1] SLC intervened in this matter by consent of the district court, Petitioners, and Defendants by answering the Verified Complaint on February 26, 2001. App. B at 9a.

10 Decision") continuing the preliminary injunction based on Petitioners' claim under 42 U.S.C. § 1983 ("Section 1983") and again remanding the matter to NJDEP. App. B at 10a; Appendix C.

On May 14, 2001, SLC filed a notice of appeal with the United States Court of Appeals for the Third Circuit. App. B at 10a. One month later, with SLC's appeal pending, NJDEP issued its Title VI analysis with respect to the Facility in accordance with the April 19 and May 10 Decisions while still denying its obligation to conduct that analysis. NJDEP concluded that the Facility would not cause any disproportionate adverse impacts in Camden, specifically including Petitioners' neighborhood. On June 15, 2001, the Third Circuit granted SLC's emergent motion to suspend the district court's preliminary injunction pending appeal. App. B at 10a.

After briefing and argument, the Third Circuit issued its decision on the merits of SLC's appeal on December 17, 2001. App. B. Following an exhaustive review of this Court's related precedent, its own prior decisions touching on the issue, and existing case law from other federal courts of appeals, the Third Circuit found that "a federal regulation alone may not create a right enforceable through [S]ection 1983 not already found in the enforcing statute."[2] App. B at 42a-43a. Thus, holding that EPA's

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[2] Despite intimations to the contrary throughout their papers, Petitioners never argued below that either Title VI, Section 601 or Title VI, Section 602 creates a federal right enforceable under Section 1983, whether in relation to disparate impacts or otherwise. Indeed, they relied solely on the proposition that a regulation can create a federal right enforceable under Section 1983 even absent the existence of any corresponding right in the underlying statute. On a similar note, in their Questions Presented for Review and elsewhere, Petitioners

(Continued on following page)

regulatory prohibition on disparate impacts had no basis in Title VI, Section 602 itself, the Third Circuit concluded that Petitioners were not likely to succeed on their Section 1983 claim and reversed the district court's issuance of an injunction against the Facility's operation. App. B at 43a.

Following the Third Circuit's denial of their motion for rehearing on January 15, 2002, Appendix A, Petitioners petitioned for a writ of certiorari from this Court on April 15, 2002.

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suggest that the Third Circuit found that EPA promulgated its Title VI regulations for their benefit, and that those regulations have the force of law under *Chrysler Corp. v. Brown*, 441 U.S. 182 (1979). To the contrary, however, the court made no such findings because its narrow holding did not necessitate any analysis of those issues. Finally, regardless of Petitioners' frequent allusions to the supposed validity of EPA's Title VI regulations, the Third Circuit, like this Court in *Sandoval*, merely *assumed* their validity and has never made any substantive holding as to that question. Thus, the Petition improperly attempts to expand the questions at issue by mischaracterizing not only Petitioners' arguments below but also the scope of the Third Circuit's holding. That holding – and thus the only appropriate issues subject to any review in this case – are as stated by SLC in its Counterstatement of Questions Presented for Review: whether a regulation can create a federal right enforceable under Section 1983 when that right is not found in the underlying statute and whether regulations prohibiting disparate impacts are based on a right found in Title VI.

LEGAL ARGUMENT

I. THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF EVERY OTHER FEDERAL COURT OF APPEALS THAT HAS ADDRESSED THE ENFORCEABILITY OF REGULATIONS UNDER SECTION 1983

Petitioners assert that the Court should review this case because the federal courts of appeals are divided as to whether "a valid substantive regulation . . . is – without more – enforceable under Section 1983." Petition for Writ of Certiorari ("Petition") at 8. Contrary to Petitioners' assertions, however, the only courts of appeals to have addressed that issue specifically – the Third, Fourth, Fifth, and Eleventh Circuits – have found that regulations cannot create rights enforceable under Section 1983 that are not found in the underlying statutory provision. *See* Section I.A, *infra*. The courts of appeals cited by Petitioners as having reached a contrary result – the Sixth, Ninth, and District of Columbia Circuits – have never in fact analyzed the question. *See* Section I.B, *infra*. Thus, no split in the federal courts of appeals exists to justify granting the Petition.

A. The Third Circuit's Decision Is Consistent with the Only Existing Precedent on the Enforceability of Regulations Under Section 1983

In addition to the Third Circuit in this case, only three other federal courts of appeals have addressed the ability of administrative regulations alone to create rights enforceable under Section 1983. The Fourth, Fifth, and Eleventh Circuits, like the Third, have all expressly held

that regulations *alone* cannot create such federal rights. App. B at 41a-43a; *Kissimmee River Valley Sportsman Ass'n v. City of Lakeland*, 250 F.3d 1324, 1326-27 & n.4 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 613 (2001); *Banks v. Dallas Hous. Auth.*, 271 F.3d 605, 610 n.4 (5th Cir. 2001); *Harris v. James*, 127 F.3d 993, 1010-11 (11th Cir. 1997);[3] *Former Special Project Employees Ass'n v. City of Norfolk*, 909 F.2d 89, 94 (4th Cir. 1990); *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987).

In reaching that result, each of the three federal courts of appeals in question has also held, as did the Third Circuit in this case, that a regulation must be paired with a corresponding right "already found in the enforcing statute" in order to be enforceable under Section 1983. App. B at 43a; *see Kissimmee*, 250 F.3d at 1327 (finding that "the instant regulation imposes new and 'distinct obligations' not found in the statute itself, and is thus 'too far removed from the Congressional intent to constitute a "federal right" enforceable under § 1983'") (citing *Harris*, 127 F.3d at 1009); *Banks*, 271 F.3d at 610 n.4 (stating "the overriding question [to be] whether Congress intended to create a federal right enforceable through § 1983"); *Former Special Project Employees Ass'n*, 909 F.2d at 94 (holding that "'an administrative regulation . . . cannot create an enforceable § 1983 interest not already implicit in the enforcing statute'") (quoting *Smith*, 821 F.2d at 984).

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[3] *See also Foster Children Bonnie L. ex rel. Hadsock v. Bush*, 180 F. Supp. 2d 1321, 1343-44 (S.D. Fla. 2001) (applying the holding in *Harris* to Title VI disparate impact regulations like those on which Petitioners rely and dismissing the plaintiffs' claim to enforce those regulations under Section 1983).

Finally, in accordance with the Third, Fourth, Fifth, and Eleventh Circuit rulings on this issue, district courts in three other circuits have reached the conclusion that "§ 1983 does not authorize indiscriminate private enforcement of the vast universe of federal regulations but extends such enforcement only to those regulations that further define the substance of a statutory (or constitutional) provision that itself creates an enforceable right." *Graus v. Kaladjian*, 2 F. Supp. 2d 540, 543 (S.D.N.Y. 1998); *see Ceaser v. Pataki*, No. 98 Civ. 8532 (LMM), 2002 U.S. Dist. LEXIS 5098 at *6-*11 (S.D.N.Y. Mar. 26, 2002);[4] *Bryson v. Shumway*, 177 F. Supp. 2d 78, 92 & n.5 (D.N.H. 2001); *Brantley ex rel. Brantley v. Indep. Sch. Dist. No. 625*, 936 F. Supp. 649, 659 (D. Minn. 1996). As a result, the Third Circuit's holding in this matter – that "a federal regulation alone may not create a right enforceable through [S]ection 1983 not already found in the enforcing statute" – conforms with existing precedent from the only federal courts of appeals to address the enforceability of regulations under Section 1983. The split in the circuits alleged by Petitioners simply does not exist, and a writ of certiorari is not needed here.

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[4] In fact, like the court in *Foster Children Bonnie L.*, *see* note 3, *supra*, the court in *Ceaser* followed *Harris* and the Third Circuit's decision in this matter to find that a Title VI regulation identical to EPA's 40 C.F.R. § 7.35(b) at issue here is not enforceable under Section 1983, *Ceaser*, 2002 U.S. Dist. LEXIS 5098 at *6-*11.

B. No Other Federal Court of Appeals Has Addressed the Enforceability of Regulations Alone Under Section 1983

Petitioners rely on decisions from the Sixth, Ninth, and District of Columbia Circuits to argue that existing case law is inconsistent with respect to the ability of regulations alone to create federal rights enforceable under Section 1983. *See* Petition at 7-8. In advancing that argument, however, Petitioners incorrectly assume that the courts in question have in fact allowed regulations themselves – without the benefit of a corresponding right in the underlying statute – to provide the basis for a Section 1983 claim and thus have addressed the issue of whether "a valid substantive regulation . . . is – without more – enforceable under Section 1983." Petition at 8. Although, on first reading, the cases at issue might seem to support that position, a careful analysis of their reasoning and holdings reveals that they provide neither evidence of a split in the federal courts of appeals nor any basis for the Court's review of this case.

For four reasons, the Sixth Circuit's decision in *Loschiavo v. City of Dearborn*, 33 F.3d 548 (6th Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995), fails to advance Petitioners' cause, despite dicta to the contrary in the Third Circuit's decision. *See* App. B at 35a (stating that "the court [in *Loschiavo*] held that because administrative regulations have the force of law, they may create enforceable rights under [S]ection 1983"). First, in describing the legal principles applicable to the plaintiffs' Section 1983 claim, the court in *Loschiavo* quoted specifically from this Court's decisions in *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), and *Suter v. Artist M.*, 503 U.S. 347 (1992), for the proposition

that a Section 1983 remedy is not available "where *the statute* did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Loschiavo*, 33 F.3d at 551 (emphasis added). Second, although the court also stated that, "federal regulations ... may create enforceable rights," *id.*, the passage from *Wright* cited in support of that assertion does not in fact discuss the ability of regulations, without more, to create federal rights under Section 1983; rather, it addresses the ability of regulations to further define rights *already implicit in the underlying statute*, *Wright*, 479 U.S. at 431. Third, when the court in *Loschiavo* turned to the facts in that case, it looked first to the relevant provision of the Cable Communications Policy Act of 1984, 47 U.S.C. § 605(a), and then recognized that the Federal Communications Commission ("FCC") promulgated the corresponding regulation at issue specifically in order to prevent local interference with "the right recognized by the 1984 Act." *Loschiavo*, 33 F.3d at 552. Finally, to the extent that *Loschiavo* may have been misread for the proposition that the FCC regulation itself created a federal right enforceable under Section 1983, it can no longer be regarded as good law. The Sixth Circuit decided that case in 1994, nearly three years before this Court issued its opinion in *Blessing v. Freestone*, 520 U.S. 329 (1997), refocusing the Section 1983 inquiry on the significance of congressional intent, which cannot, by definition, be determined by reference to an administrative regulation alone. Thus, rather than manifesting any split in the federal courts of appeals, *Loschiavo* is in complete harmony with the Third

Circuit's decision in this matter and existing precedent in the Fourth, Fifth, and Eleventh Circuits.[5]

Similarly, in *Buckley v. City of Redding*, 66 F.3d 188 (9th Cir. 1995), the Ninth Circuit analyzed not the enforceability of regulations *alone* under Section 1983 but whether "the statute [in question] *and* its interpretive regulations create[d] an enforceable federal statutory right," *id.* at 190 (emphasis added). Indeed, the court itself stated the issue before it as "whether *the Federal Aid in Sport Fish Restoration Act* . . . , confers a right enforceable under 42 U.S.C. § 1983. . . . We hold that *the Act* does confer rights enforceable under [S]ection 1983." *Id.* at 189 (emphasis added). Following that introduction, the court made the following observations:

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[5] Even assuming that the Eastern District of Michigan's decision in *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767 (E.D. Mich. 2001), could provide evidence of a split of opinion among the federal courts of appeals, it does not in fact lend any support to Petitioners' argument. First, the court in *Lucero* relies heavily on both the district court's May 10 Decision in this case, which the Third Circuit has now overturned, and *Loschiavo*, which, as shown above, did not hold that regulations can create freestanding federal rights enforceable under Section 1983. Further, in determining whether a Section 1983 right existed in the case, the court looked specifically to the statute in question, Title VI, rather than to Title VI regulations alone. *See id.* at 784 (finding that "*Title VI of the Civil Rights Act* and implementing regulations promulgated pursuant to Section 602 of the Act, were intended to benefit persons of color," "*[t]he Title VI provisions* are not vague and amorphous," *Title VI's* use of the word "shall" implies the existence of a binding obligation, and "*Title VI* creates a federal right of action pursuant to 42 U.S.C. § 1983") (emphasis added). Thus, again, *Lucero* provides no support for the existence of a split among the circuits as to whether, absent any corresponding right in the underlying statute, a regulation alone can create an enforceable federal right under Section 1983.

- "[T]he Act clearly is intended to benefit the plaintiffs."
- "[T]he Act creates a binding obligation on the state."
- "[T]he Act unambiguously creates a right enforceable under [S]ection 1983."
- "Nothing in the Act suggests that Congress expressly intended to foreclose the [S]ection 1983 remedy."

Id. at 192. Thus, the court in *Buckley* did not hold that the regulations at issue in the case, standing alone, created an enforceable federal right under Section 1983 and provided no guidance as to whether regulations can ever do so. Instead, both the analysis and holding in *Buckley* are fully consistent with the Third, Fourth, Fifth, and Eleventh Circuits' conclusion that regulations must be paired with a corresponding right in the enforcing statute in order to support a Section 1983 action.[6]

The District of Columbia Circuit's decision in *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985), also

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[6] To the extent Petitioners suggest that the Ninth and Eleventh Circuits' contrary findings in *Buckley* and *Kissimmee* with respect to the availability of a Section 1983 action under the Federal Aid in Sport Fish Restoration Act ("FAISFRA") somehow manifest a split in the federal courts of appeals over the ability of regulations to create a freestanding federal right for Section 1983 purposes, they are mistaken. Not only are the Ninth and Eleventh Circuits in complete accord, as shown above, as to the relevant issue here: whether "a[n assumedly] valid substantive regulation . . . is – without more – enforceable under Section 1983," Petition at 8, but the substantive question of whether FAISFRA and its implementing regulations satisfy the *Blessing* test is inapposite in this case, which instead involves the enforceability of Title VI and EPA's Title VI regulations under Section 1983.

provides no evidence of a split among the federal courts of appeals on the issues relevant to this matter. Like the Ninth Circuit in *Buckley*, the court in *Samuels* looked not at whether a regulation could create an enforceable federal right not found in the underlying statute but at whether "the specific section of *the [United States Housing] Act*" at issue did so. *Id.* at 189 (emphasis added).[7] Further, to the extent that the court spoke of enforcing regulations under Section 1983, it specified that only "those federal regulations adopted pursuant to a clear congressional mandate" – i.e., only those regulations embodying a right already implicit in the underlying statute – could qualify for such enforcement. *Id.* at 199. Finally, like *Loschiavo* – and, in fact, *Buckley*, as well – *Samuels* significantly pre-dates this Court's decision in *Blessing*, with its emphasis on congressional intent. Therefore, any reliance by the District of Columbia Circuit on regulations to provide the sole basis for an enforceable federal right has no place in current Section 1983 jurisprudence.

As demonstrated, *Loschiavo*, *Buckley*, and *Samuels* never in fact reached the issue of whether a regulation alone can create a federal right enforceable under Section

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[7] For further evidence of the court's emphasis on statutory provisions when analyzing Section 1983 enforceability, *see also Samuels*, 770 F.2d at 196 ("*The Housing Act*, by contrast, does not expressly establish *any* administrative or judicial remedy. . . . ") (second emphasis in original); *id.* at 197 ("[S]ection 1437d(k) is codified in the operative body of the Act, and its language is unequivocally specific and mandatory."); *id.* at 201 ("[T]he plaintiffs have alleged a violation of *both* section 1437d(k) *and* HUD's grievance procedure regulations.") (emphasis added); *id.* ("The defendants' alleged [conduct] violates th[eir] mandatory federal obligation as expressed in *both* the Act *and* its accompanying regulations.") (emphasis added).

1983 when that right is not found in the underlying statute. Thus, those decisions are entirely consistent with the Third Circuit's holding in this case, and with existing precedent from the Fourth, Fifth, and Eleventh Circuits, that a regulation alone cannot create a right enforceable under Section 1983 but must be paired with a corresponding right "already found in the enforcing statute." As a result, none of the cases cited by Petitioners provides any basis for a writ of certiorari in this matter, and the Petition should be denied.

II. THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT

A. The Third Circuit Correctly Applied This Court's Decisions in *Sandoval, Cort v. Ash*, and *Blessing* to Petitioners' Claim Under Section 1983

Petitioners allege that, in finding EPA's Title VI regulations unenforceable under Section 1983, the Third Circuit misapplied this Court's decisions in *Sandoval*, 532 U.S. 275; *Cort v. Ash*, 422 U.S. 66 (1975); and *Blessing v. Freestone*, 520 U.S. 329 (1997). Petition at 5-7. To the contrary, the Third Circuit's decision and analysis are in full accord with this Court's holdings and reasoning in those cases. Thus, again, a writ of certiorari is unnecessary in this matter.

In *Sandoval*, the Court considered whether Department of Transportation regulations prohibiting disparate impacts that are identical to EPA's Title VI regulations provided a private right of action under the standard first set forth in *Cort v. Ash*. *Sandoval*, 532 U.S. at 278. In

finding that they did not, the Court focused almost exclusively on Congress's intent to create a federal right in favor of the plaintiffs. Because that intent is also the first factor analyzed under *Blessing* to determine the existence of an enforceable federal right under Section 1983, the Third Circuit recognized that this Court's reasoning in *Sandoval* was directly applicable to Petitioners' claim, even while acknowledging that *Sandoval* did not involve a Section 1983 action. *See* App. B at 15a-16a & n.5, 37a-40a & n.12. Thus, the Third Circuit did not, as the Petition appears to assert, mistakenly apply the *Cort v. Ash* standard to Title VI, Section 602 in attempting to determine whether Petitioners' alleged federal right under EPA's Title VI regulations was also "implicit in the enforcing statute."[8] Rather, the court merely gave effect to the overlap between the test applied in *Sandoval* and the test applicable here that had been previously identified by members of this Court, *see, e.g.*, *Wright*, 479 U.S. at 434 (O'Connor, J., dissenting) (recognizing that the implied right of action test overlaps the analysis for a Section 1983 enforceable right in its focus on congressional intent), and its decision is fully consistent with the holdings in *Cort v. Ash* and *Blessing*.[9]

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[8] As previously stated, *see* note 2, *supra*, Petitioners never argued below that Title VI, Section 602 creates any enforceable rights, with respect to disparate impacts or otherwise, and relied solely on the assertion that EPA's Title VI regulations alone create such rights. As indicated, however, the analysis employed by the Third Circuit required at least some consideration of that issue in order to determine whether the alleged rights at issue are in fact "not found in the enforcing statute." *See* App. B at 42a-43a; Section I.A, *supra*.

[9] Curiously, Petitioners also argue that the Third Circuit's decision is inconsistent with *Blessing* in that "[t]he Title VI disparate impact regulations have the same rights creating language which this Court

(Continued on following page)

Likewise, the Third Circuit's analysis is in complete harmony with the majority's reasoning and holding in *Sandoval*. Indeed, contrary to Petitioners' assertion that the majority in *Sandoval* neither "rebutted" nor "adversely commented on" the dissent's statement that plaintiffs have a right to enforce disparate impact regulations under Section 1983, Petition at 5, the entire course of the majority's reasoning and logic contradicts the availability of a Section 1983 action to enforce Title VI, Section 602 or EPA's Title VI regulations prohibiting disparate impacts. First, the *Sandoval* majority, like the Third Circuit in this case, noted that Title VI, Section 601 proscribes only intentional discrimination.[10] *Sandoval*, 532 U.S. at 280 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978)); App. B at 37a. Both this Court and the Third Circuit then acknowledged, however, that Title VI, Section 601's proscription against intentional discrimination was not sufficient to create any rights with respect to unintentional disparate impacts and thus recognized that Title VI, Section 602 provided the only possible basis for that alleged right. *Sandoval*, 532 U.S. at 284; App. B at 37a

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has looked to in *Blessing* . . . , prohibiting conduct which has 'the effect of subjecting individuals to discrimination.'" Petition at 16 (quoting 40 C.F.R. § 7.35(b)). Contrary to Petitioners' claims, however, the Court in *Blessing* in fact found no rights-creating language – and thus no enforceable federal right – in a statutory provision requiring state child support services to maintain "substantial compliance" with the Social Security Act. *Blessing*, 520 U.S. 329.

[10] Thus, in stating that "[t]his Court has declared that Congress did intend Section 601, which declares 'no person . . . shall be subject to discrimination,' to be an enforceable right," Petition at 15 (citing *Sandoval*, 532 U.S. at 279-80), Petitioners fail to acknowledge the true nature of the Court's finding: that the enforceable right at issue extends only to intentional discrimination and not to unintentional disparate impacts.

("Since the time of the Supreme Court's decision in *Sandoval*, it hardly can be argued reasonably that the right alleged to exist in the EPA's regulations, namely to be free of disparate impact discrimination in the administration of programs or activities receiving EPA assistance can be located in . . . [S]ection 601.").

In *Sandoval*, however, this Court found that the focus of Section 602 is not on the individuals protected or even the state agencies that receive federal funding and are regulated, but rather on the federal agencies that disburse the funds to the state agencies. *Sandoval*, 532 U.S. at 289. Indeed, "the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection." *Id.*; *see also* App. B at 39a (quoting this language). Therefore, "rights-creating" language is completely absent from this provision of the statute. *Sandoval*, 532 U.S. at 288; *see also* App. B at 39a (quoting this Court's findings in that regard). As this Court stated:

> Whereas § 601 decrees that "[n]o person . . . shall . . . be subjected to discrimination," the text of § 602 provides that "[e]ach Federal department and agency . . . is authorized and directed to effectuate the provisions of [§ 601]." *Far from displaying congressional intent to create new rights, § 602 limits agencies to "effectuat[ing]" rights already created by § 601.*

Sandoval, 532 U.S. at 288-89 (citations omitted; emphasis added); *see also* App. B at 39a (quoting this passage). Because the Third Circuit incorporated these very findings, word for word, into its opinion, its decision is necessarily consistent with this Court's ruling in *Sandoval*.

As a result, although discussed in different – albeit related – contexts, this Court has unambiguously demonstrated – and the Third Circuit has agreed – that Title VI, Section 602 does not create a federal right with respect to disparate impacts. *Sandoval*, 532 U.S. at 289; App. B at 41a. The Third Circuit's decision applied this Court's reasoning in that regard in a manner completely consistent with the Court's precedent under *Cort v. Ash* and *Blessing*, and no writ of certiorari is justified in this matter.

B. The Third Circuit's Decision Does Not Conflict with This Court's Unrelated Decisions in *Chrysler* and *Chevron*

Petitioners also assert that the standard used by the Third Circuit to determine whether a regulation is enforceable under Section 1983 conflicts with this Court's decisions in *Chrysler*, 441 U.S. 281, and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Petition at 9-13. To the contrary, *Chrysler* and *Chevron* are inapplicable to the Third Circuit's narrow holding, which thus cannot possibly create any conflict as claimed.[11] Accordingly, Petitioners' arguments in that regard provide no basis for a writ of certiorari in this case.

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[11] Moreover, as discussed in Section II.B.1, *infra*, although not necessitated by existing precedent, application of this Court's reasoning in *Chrysler* to the facts of this case results in a conclusion consistent with that reached by the Third Circuit.

1. This Court's holding in *Chrysler* does not conflict with but, rather, lends further support to the Third Circuit's decision

At the heart of Petitioners' misplaced reliance on *Chrysler* is their apparent misconception regarding the import of a regulation with the "force of law" under the Court's decision in that case. According to Petitioners, if a regulation has the "force of law" pursuant to *Chrysler*, it necessarily qualifies as a "law" for purposes of Section 1983 and, therefore, assuming satisfaction of the *Blessing* standard, is enforceable under Section 1983. Thus, Petitioners assert that, by holding that a regulation cannot create a right enforceable under Section 1983 unless that right is already found in the underlying statute, the Third Circuit has somehow created "two tests to determine whether a regulation has the 'force of law,'" in conflict with *Chrysler*. Petition at 12. For three reasons, however, Petitioners' reasoning is fatally flawed.

First, *Chrysler* did not involve a Section 1983 claim. Rather, *Chrysler* addressed the specific question of whether Office of Federal Contract Compliance Programs ("OFCCP") regulations could provide authorization "by law" for disclosing information under the Trade Secrets Act. *Chrysler*, 441 U.S. at 295. In addressing that issue, this Court analyzed the difference between "substantive" regulations that have the "force and effect of law" and "interpretative" regulations that receive varying degrees of deference. *Id.* at 301-302, 315. The Court did not in any way consider whether a regulation can qualify as a "law" for purposes of Section 1983.

Second, *Chrysler* could not possibly have had any impact on the law of Section 1983 because that decision

came the year before the Court even determined that all statutes – from which all regulations necessarily derive – are themselves enforceable under Section 1983 if they create federal rights. *Maine v. Thiboutot*, 448 U.S. 1 (1980). Clearly, therefore, when this Court declared in *Chrysler* that certain regulations can have the "force of law," it was not equating such regulations with "laws" under Section 1983. Indeed, this Court has never held as much.

Finally, a fair reading of *Chrysler* supports the conclusion that, even if it were applicable in this matter, the Third Circuit's decision would be consistent with the holding in that case. As stated previously, *Chrysler* involved the distinction between substantive and interpretative regulations. In defining the distinction between those two categories, the Court found that, in order to be substantive, a regulation must have some nexus to a "delegation of the requisite legislative authority by Congress," *Chrysler*, 441 U.S. at 304, and affect "'individual rights and obligations,'" *id.* at 302 (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)).[12] In contrast, interpretative regulations merely set forth "'general statements of policy, or rules of agency organization, procedure or practice.'" *Chrysler*, 441 U.S. at 301.

At the outset, a comparison of the precise language of *Chrysler* – requiring a "nexus" between the regulation at issue and a delegation of legislative authority – and Petitioners' characterization of the Third Circuit's holding

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[12] In addition, the regulations must have been promulgated in conformity with any procedural requirements imposed by Congress. *Chrysler*, 441 U.S. at 303.

– requiring that the regulation "explicate" a provision of the underlying statute – reveals that, even under Petitioners' own analysis, the court in each case was looking for the same critical factor: an intention by Congress to create the right or obligation in question. However, the right allegedly created by EPA's Title VI regulations – a right to freedom from disparate impacts – is found nowhere in Title VI. Indeed, as set forth in detail in Section II.A, *supra*, this Court confirmed that conclusion in *Sandoval*. Therefore, the regulations at issue lack the nexus to a "delegation of the requisite legislative authority by Congress" required of substantive regulations under *Chrysler* and would not have the "force of law," even if that case were applicable here.

Moreover, the very language to which Petitioners point in support of their asserted right to freedom from disparate impact discrimination, 40 C.F.R. § 7.35(b), reveals that EPA's Title VI regulations are interpretative in nature. Specifically, 40 C.F.R. § 7.35(b) provides as follows:

> A recipient [of EPA funding] shall not use *criteria or methods* of *administering its program* which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing *accomplishment of the objectives of the program* with respect to individuals of a particular race, color, national origin, or sex.

40 C.F.R. § 7.35(b) (emphasis added). Thus, the regulation aims not at affecting "individual rights and obligations" but merely at setting forth "general statements of policy, or rules of agency organization, procedure or practice"

with respect to the administration of programs receiving federal funding. It does not have the "force of law" and, even under *Chrysler*, is not, as Petitioners assert, enforceable under Section 1983.

Accordingly, contrary to Petitioners' assertions, the Third Circuit's decision does not conflict with *Chrysler*. Instead, *Chrysler* is inapplicable to the Third Circuit's narrow holding. Moreover, application of *Chrysler* to the facts at issue would necessarily dictate a finding consistent with the ultimate conclusion reached below. Petitioners' argument, therefore, does not provide any grounds for granting a writ of certiorari in this case.[13]

2. This Court's holding in *Chevron* is inapplicable to the Third Circuit's decision because the Third Circuit assumed the validity of EPA's Title VI regulations

Petitioners also claim that the Third Circuit's decision is "contrary to the principles espoused in *Chevron*." Petition at 9-13. Once again, however, the Court's decision

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[13] In further support of their improper contention that the Third Circuit applied the wrong test in this matter, Petitioners assert that "substantive regulations, having the force of law, create rights which pre-empt state law under the supremacy clause" and "create obligations which can lead to criminal penalties." Petition at 11-12 (citations omitted). Once again, such assertions are meaningless as they have no bearing on the issue actually decided by the Third Circuit in this matter: whether an assumedly valid regulation can create a right enforceable under Section 1983 when that right is not found in the underlying statute. The mere fact that a regulation may preempt state law or impose criminal penalties does not in any way equate with Petitioners' conclusion that a regulation may therefore create a right enforceable under Section 1983.

in *Chevron* is wholly inapplicable to – and thus cannot conflict with – the Third Circuit's narrow holding in this case.

In *Chevron*, this Court considered whether an agency's construction of a statute was permissible when Congress had not directly spoken to the precise question at issue. *Chevron*, 467 U.S. at 842-43. The Court concluded that EPA's regulatory interpretation of the statute in question represented a reasonable accommodation of manifestly competing interests and thus deserved deference and was valid. *Id.* at 865.

Not only was *Chevron* therefore not a Section 1983 case, but it is completely lacking in any analysis applicable to this matter because, for purposes of its decision, the Third Circuit simply assumed the validity of EPA's Title VI regulations and their prohibition against disparate impacts.[14] *See* App. B at 19a n.6 ("We assume without

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[14] Although the question of the regulations' validity was thus irrelevant to the Third Circuit's decision, this Court has never held – in *Guardians Association v. Civil Service Commission of New York*, 463 U.S. 582 (1983); in *Alexander v. Choate*, 469 U.S. 287 (1985); or in any other case – that "agency regulations validly prohibit recipients of federal funds from conducting programs in a manner with a discriminatory effect, even if Title VI itself prohibits only intentional discrimination." Petition at 13. Indeed, the Court explicitly recognized that point just last term. *Sandoval*, 532 U.S. at 282 (stating that "no opinion of this Court has held that [such regulations are valid]" and characterizing statements regarding their validity in *Guardians* as "alternative grounds" for the decisions of five Justices and in *Choate* as "dictum"). Moreover, this Court in *Sandoval*, like the Third Circuit in this case, simply "assume[d] for purposes of deciding th[e] case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups" and thus did nothing to settle the issue. *Id.*

deciding that the regulations are valid. . . . "); App. B at 41a ("In sum, the regulations, though *assumedly* valid, are not based on any federal right present in the statute.") (emphasis added). Therefore, *Chevron* has no relevance to the Third Circuit's holding – that regulations cannot create federal rights enforceable under Section 1983 that are not found in the underlying statute – and that holding is therefore not inconsistent with the Court's ruling in *Chevron*. As a result, the Petition should be denied.

C. As Demonstrated by This Court's Prior Holdings, the Third Circuit's Decision Is Consistent with Congressional Intent

Finally, Petitioners argue that the Third Circuit's decision is inconsistent with the legislative history of Title VI. Petition at 16-19. In advancing that argument, they rely on testimony from former Secretary of Health, Education, and Welfare Anthony Celebrezze and former Attorney General Robert Kennedy for the apparent proposition that Congress intended administrative agencies to define the term "discrimination" as used in the statute to encompass disparate impacts. *See* Petition at 16-17. However, it is Petitioners' reading of the legislative history of Title VI – not the Third Circuit's decision – that misinterprets the relevant congressional testimony and, in doing so, contradicts nearly twenty-five years of this Court's settled precedent with respect to Congress's intent in enacting that statute. Thus, although Petitioners' argument goes to the merits of this case rather than the propriety of a writ of certiorari in this matter, it warrants a response. It does not, however, justify granting the Petition.

After a thorough examination of the legislative history of Title VI in *Bakke*, 438 U.S. at 284-87 & nn.21-24, this Court concluded that Congress intended Section 601 of the statute to prohibit "only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 287; *see Sandoval*, 532 U.S. at 280-281 (citations omitted). The Court then clarified in *Guardians* that Section 601 therefore reaches only intentional discrimination and reaffirmed that view in *Choate*, and, most recently, *Sandoval*. *See Sandoval*, 532 U.S. at 281 (citations omitted).

Further, throughout the testimony of Secretary Celebrezze on which Petitioners rely, the members of the House Judiciary Committee made clear that they did not endorse the interpretation of Title VI to prohibit disparate impacts. *See, e.g., Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong. 1519 (1963) ("[T]here is no provision in this bill that provides that funds can be cut off because of any racial imbalance.") (statement of Rep. Celler, Chairman, House Comm. on the Judiciary); *id.* at 1520 ("If it be determined by the administrator that there is *intentional imbalance* in attendance at schools which results in discrimination and segregation by reason of that fact, there is authority in this section, in my opinion, to withhold the funds on the decision of a single administrator.") (statement of Rep. McCullough, Member, House Comm. on the Judiciary) (emphasis added); *id.* at 1517 ("[T]he [Supreme] Court in outlawing segregation didn't require racial balance.") (statement of Rep. Cramer, Member, House Comm. on the Judiciary). Moreover, Secretary Celebrezze agreed with those assessments. *See, e.g., id.* at 1520 ("[W]hat we are discussing here is discrimination in education or in other areas because of race, and it has nothing to do with the

question of racial balance or imbalance. . . . [W]e are not given the authority under [T]itle VI to enforce racial balance; we are given authority under [T]itle VI on the sole question of discrimination because of color or because of race or because of religion. That is the controlling factor.").

Thus, upon careful analysis, it is apparent that Petitioners' reading of the legislative history of Title VI – not the Third Circuit's decision in this matter – is inconsistent with this Court's precedent on the issue and the demonstrated intent of Congress. Indeed, because Congress intended Title VI to reach only intentional discrimination, the Third Circuit was fully justified in finding that the statute creates no right to freedom from unintentional disparate impacts. As a result, the Petition provides no support for a writ of certiorari in this matter.[15]

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[15] Petitioners also argue that the Third Circuit's holding in this case will impose great hardship on Congress because it means that "Congress fails to create any 'rights . . . secured by . . . laws' when it authorizes substantive agency regulations." Petition at 13 (citations omitted). Putting aside the fact that Petitioners have incorrectly assumed that EPA's Title VI regulations are substantive, *see* Section II.B.1, *supra*, the Third Circuit's decision will not have the impact asserted because, even under that decision, EPA's regulations remain enforceable through appropriate administrative mechanisms. Petitioners are likewise incorrect in their assertion that, in four statutes enacted after the Civil Rights Act of 1964, Congress ratified EPA's Title VI regulations and others like them by directing agencies to promulgate rules similar to those in effect under Title VI and thus somehow intended Title VI to incorporate a disparate impact standard. Petition at 17-19. As this Court has "often observed . . . 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (citing *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963)).

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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